

# Build America, But American, Act (BABA) Requirements for CDBG Projects

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Georgia Department of Community Affairs



Equal Housing Opportunity

Equal Housing Opportunity

# What is BABA?

- Enacted in the Infrastructure Investment and Jobs Act signed by President Biden on November 15, 2021.
- Requires that products purchased in connection with infrastructure projects funded by Federal financial assistance programs must be produced in the United States.
  - This requirement is known as the “Buy America Preference (BAP).”
- The following products used in Federally funded infrastructure projects must be produced in the United States:
  - Iron and steel;
  - Manufactured products; and
  - Construction materials.
- For the purposes of BABA, an infrastructure project is defined as any project that includes the following activities:
  - Construction,
  - Alteration,
  - Maintenance,
  - Repair.

# Definitions

## Buy America Preference (BAP)

- Statutory requirement that Federal funding for infrastructure projects use “covered materials” that are “American-made.”

## Federal Financial Assistance (FFA)

- Grants
- Cooperative agreements
- Non-cash contributions
- Direct assistance
- Loans
- Loan guarantees
- Other financial assistance

## Infrastructure

- Buildings and real property
  - Including housing
- Utilities
- Water systems (drinking water and wastewater)
- Electrical transmission facilities and systems
- Broadband infrastructure
- Transportation infrastructure

# Definitions Cont'd

## Construction Materials

Includes all raw materials used in construction, including:

- metals other than iron/steel,
- plastic materials such as PVC pipe,
- glass,
- lumber,
- drywall.
- Does not include cement and aggregates (stone, sand, gravel).

## Manufactured products

- A material or supply used in an infrastructure project that is not iron or steel or a construction material.
- When two or more materials are combined, they should be treated as a manufactured product.

## Iron and steel

Includes materials that are primarily composed of iron or steel.

# HUD Construction Materials Groups

HUD’s waiver breaks construction materials into two groups for the purposes of HUD’s phased implementation: “specifically listed” and “all other construction materials.”

- Specifically Listed
  - Metals other than iron or steel (non-ferrous metals)
  - Lumber
  - Composite building materials
  - Plastic and polymer-based pipe and tube (e.g., PVC pipe)
- All Other Construction Materials
  - Glass
  - Drywall
  - Other construction materials



BAP will apply to...	Iron and Steel	Specifically Listed Construction Materials	All Other Construction Materials	Manufactured Products
CDBG Formula Grants	All funds obligated on or after November 15, 2022	As of the date HUD obligates new FFA from FY24 appropriations	As of the date HUD obligates new FFA from FY25 appropriations	As of the date HUD obligates new FFA from FY25 appropriations

# HUD General Waivers

## Phased Implementation

- Waiver published March 15, 2023, establishes a phased implementation Phased Implementation schedule for application of the BAP to HUD programs.

## Exigent Circumstances

- BAP may be waived if projects must be completed immediately to protect life, ensure safety, or prevent the destruction of property
- Effective until November 23, 2027

## *De Minimis*, Small Grants, & Minor Components

- BAP waived for projects with a total cost of \$250,000 or less
- BAP waived for a de minimis portion that comprises no more than 5 percent of the total cost of covered materials used in a project, up to \$1 million
- Effective until November 23, 2027

## Tribal Recipients

- BAP waived for FFA to Tribes, Tribally Designated Housing Entities, and other Tribal Entities to allow for appropriate tribal consultation
- Effective until May 23, 2024

# Project-Specific Waivers

- Three categories of waivers:
  - Public interest: BAP would be inconsistent with the public interest.
  - Nonavailability: covered materials are not produced in the US in sufficient and reasonably available quantities or of a satisfactory quality.
  - Unreasonable cost: inclusion of domestically produced covered materials will increase the cost of the overall project by more than 25 percent.

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The process for requesting project-specific waivers is under development and more information will be shared as it becomes available.



# Phased Implementation

- BAP now applies to:
  - Infrastructure 2023 CDBG Projects containing iron and steel with a costs greater than \$250K
- BAP does **not** apply to:
  - Non-infrastructure funding.
  - Infrastructure projects that do not contain steel
  - Infrastructure projects with a total costs of \$250K or less
  - CDBG-DR, CDBG-MIT, CDBG –CV projects
  - Projects qualifying under another HUD general waiver

# BABA Applicability

The BAP is now in effect for CDBG iron or steel projects using funds obligated on or after November 15, 2022.

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# Demonstrating Compliance

- Recipients will ensure the products delivered to the construction site are accompanied by proper documentation that demonstrate compliance with the law and made available to the funding authority upon request.
- Signed certification letter from the manufacturer for the project is the most direct and effective form of compliance documentation for ensuring products used on site are BABA-compliant prior to their installation
- Basic elements of sufficient documentation:
  - Project name, project location, contract number, or project number
  - Description of product(s) (simple explanation sufficient to identify the product(s)), or an attached purchase order, invoice, or bill of lading.
  - Attestation statement referencing Infrastructure Investment and Jobs Act (“IIJA”) or the Bipartisan Infrastructure Law (BIL) and American Iron and Steel (AIS) requirements
  - Manufacturing location (s)
  - Signature of representative certifying knowledge of manufacturing processes.

# Contract Requirements

- Architect/ Engineer contract should include, as a basic service, obtaining and maintaining all BABA documentation (particularly manufacturers' certifications) during construction, which shall be transferred to the recipient. The architect or engineer will need to certify to this action at the project's end.
- At a minimum, the following must be included in all construction contract documents: All requirements of the Build America, Buy America (BABA) Act, 41 USC 8301 note, and all applicable rules and notices, as may be amended, shall be complied with if applicable to the infrastructure project. Pursuant to HUD's Notice, "Public Interest Phased Implementation Waiver for FY 2022 and 2023 of Build America, Buy America Provisions as Applied to Recipients of HUD Federal Financial Assistance" (88 FR 17001), any funds obligated by HUD on or after the applicable listed effective dates, are subject to BABA requirements, unless excepted by a waiver.
- Contractors must provide manufacturers' certifications for all BABA compliant items to the responsible party before a request for reimbursement to the agency is made.

# Bid Requirements

## **Advertisement for Bids**

- This agreement is for services related to a project that is subject to the Build America, Buy America Act (BABAA) requirements under Title IX of the Infrastructure Investment and Jobs Act (“IIJA”), Pub. L. 177-58. Absent an approved waiver, all iron, steel, manufactured products, and construction materials used in this project must be produced in the United States, as further outlined by the Office of Management and Budget’s Memorandum M-22-11, Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure, April 18,2022.

## **Instructions to Bidders**

- Any request for substitute or “or equal” shall include the Manufacturer’s Certification of compliance with the Build America, Buy America Act (BABAA) requirements mandated by Title IX of the Infrastructure Investment and Jobs Act (“IIJA”), Pub. L. 177-58. If the Instructions include a Federal requirements section, include the following: BABAA requirements apply to this project.

## **Bid Form**

- Bidder’s representation section: Bidder is familiar with all laws and regulations that may affect cost, progress, and performance of the work, including BABAA requirements.

# General Condition

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- The following general condition has been added:
  - The Recipient, by signing these conditions, is certifying that it will comply with the requirements of the Build America, Buy America Act ("BABA" or "the Act") as enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (IUA).Public Law 117-58. The Act establishes a domestic content procurement preference, the BAP, for Federal infrastructure programs. The Recipient must ensure that none of the funds made available for infrastructure projects may be obligated unless it has taken steps to ensure that the iron, steel, manufactured products, and construction materials used in a project are produced in the United States. The Act further defines a project to include "the construction, alteration, maintenance, or repair of infrastructure in the United States" and includes within the definition of infrastructure those items traditionally included along with buildings and real property. Thus, new awards of Federal Financial Assistance from a program for infrastructure, and any of those funds obligated by the grantee or Recipient, are covered under the BABA provisions of the Act, 41 U.S.C. 8301 note, unless covered by a waiver.

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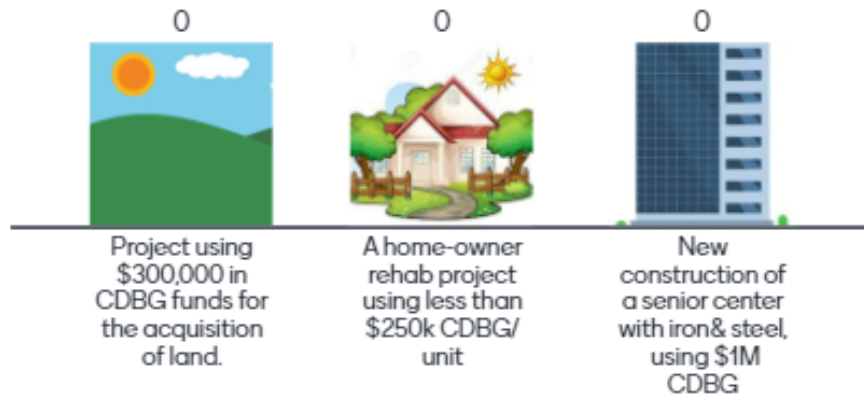
**Will BAP apply, to a water & sewer project  
(which includes iron and steel) with a CDBG  
budget of \$900,000?**





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 Mentimeter



# Resources

- HUD Waivers
- [https://www.hud.gov/program\\_offices/general\\_counsel/baba](https://www.hud.gov/program_offices/general_counsel/baba)
- OMB Memo - Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure (M-22-11)
- <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>
- OMB proposed rule – Guidance for Grants & Agreements (add a new part 184 of 2 CFR and revise [2 CFR 200.322](#))
- <https://www.federalregister.gov/documents/2023/08/23/2023-17724/guidance-for-grants-and-agreements>

# Wrap – Up

## General Sessions in Oglethorpe FGH

- 7:30a – 8:30a **BREAKFAST** Oglethorpe E
- 8:30a – 9:15a **Successfully Implementing a Project** | Presenters: Cynthia Alligood & Robert Compton
- 9:30a – Noon **Understanding Compliance Requirements** | Presenters: Brittney Hickom, Pamela Truitt & Nina Abbas
- Noon – 1:15p **LUNCH** Oglethorpe E
- 1:15p – 2:15p **Uniform Relocation Assistance & Real Property Acquisition Act (URA)** | Presenter: Glenn Misner  
**Special Condition Compliance and eCivis Award Administration** | Presenter: Kathleen Vaughn
  
- 2:30p – 4:00p **CONCURRENT SESSIONS**
  - Session 1: CDBG Housing Workshop** | Presenters: Glenn Misner & Malisa Thompson
  - Session 2: Technical Assistance Tables | Oglethorpe Pre-function**
    1. Federal Labor Standards
    2. BABA Requirements & Grant Amendments
    3. Special Conditions, Procurement, Section 3
    4. Project Monitoring
    5. Award Package & Financial Documents, Draw Process and Documentation
    6. Environmental & Activity Reports

# Thanks!

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